86-763

No. _____

IN THE

Supreme Court of the United States

October Term, 1986

W. NYLES SPURLOCK,

Petitioner,

v.

LOIS E. WREN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 9, 1986

QUESTIONS PRESENTED

1. Where a public employee alleges retaliation for exercise of First Amendment rights, is the *Pickering* balance misapplied where there is a complete failure to give any consideration to the government's interest as required by *Connick v. Myers*, and the sole basis for resolving the balance in the employee's favor is the previously unrecognized factor of the employee's purported continuing competence?

2. Where a public employee alleges retaliation for exercise of First Amendment rights, does such retaliation rise to a level of constitutional infringement where it consists of alleged increased harrassment, and does not involve suspension, termination, demotion, transfer, reduction of benefits, or other such significant alteration of employment status?

3. Where a claim under 42 U.S.C. § 1983 is based on allegations of retaliation for exercise of protected First Amendment speech, are instructions plainly erroneous because the trial court failed to specify the protected speech involved and thereafter permitted the jury by means of a compound interrogatory to find liability either on the basis of retaliation against protected or unprotected speech, or on the basis of causing "other injury," and then allowed recovery for "any injuries" suffered?

4. Where plaintiff asserts a 42 U.S.C. § 1983 claim jointly against three defendants based on allegations of retaliation for exercise of First Amendment rights and further alleges as her injury emotional distress that impaired her ability to work, is there indivisible injury as a matter of federal law thereby entitling a non-settling defendant to have judgment against him reduced by the amount of a prior settlement paid by the other two codefendants?

LIST OF PARTIES

LOIS E. WREN,

Respondent-Plaintiff,

v.

W. NYLES SPURLOCK,

Petitioner-Defendant

and

HUGH SIMMONS, CARBON COUNTY SCHOOL DISTRICT NO. 1,

Other Defendants.

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The petitioner W. Nyles Spurlock respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-titled proceeding on August 11, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 798 F.2d 1313, and is reprinted in the appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, the respondent brought this suit in the District of Wyoming. On August 11, 1986, the Tenth Circuit entered a judgment and an opinion affirming the judgment of the Wyoming District Court. The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983: Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

AMENDMENT I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Respondent, Lois E. Wren, was a secondary school science teacher in Baggs, Wyoming, a small town with a population of six hundred (V:355).[1] The school consisted of one building with all grades from first through twelfth included. There were seventeen teachers in the school (Supp. I:13-14). Wren brought a complaint pursuant to 42 U.S.C. § 1983 against her principal (the petitioner, W. Nyles Spurlock), the superintendent (Dr. Hugh Simmons) and the school district alleging retaliation for exercise of her First Amendment rights (I:1).[2]

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[1]References are to the Record Below. As used herein, "V:355" means Volume V, page 355. "Supp.I:13-14" means Supplemental Volume I, pages 13-14. "P/Ex.230:4" means Plaintiff's Exhibit 230, page 4. "D/Ex." refers to Defendant's exhibit. All exhibits are contained in Volume XIV of the Record below.

[2]Wren also asserted two state tort claims premised on theories of outrageous conduct and interference with her school contract (I:1). Both were withdrawn prior to trial (II:204).

Wren claimed that as a result of exercising a protected First Amendment right in writing her union (the Wyoming Education Association (WEA)) on April 19, 1980, to investigate Spurlock's performance, Defendants retaliated against her in the form of increased harrassment (by Spurlock) and an attempted half-day suspension with pay (by Simmons) (*Id.*).[3] The injuries claimed by Wren involved health problems caused by emotional distress that impaired her ability to work (*Id.*).

Spurlock understood his duties as principal to include the evaluation of the faculty, the discipline and welfare of the children, instructional leadership, the control of operational functions of the school and the supervision of employees (XII:7-9). Spurlock was known as an authoritarian, who in his role as principal had suspended his daughter from school and had reprimanded his wife, a teacher at the school (X:206-07). Spurlock described himself as having a "linebacker" personality (IV:92-93).

From the beginning of her employment in 1974, Wren objected to Spurlock's treatment of her. Wren considered Spurlock to be unfairly critical and complained that he had lied on her observation reports; and that by her third year there was a noticeable increase in criticism (VI:142-43). By March, 1978, Spurlock in turn had accused Wren of being insubordinate (P/Ex.230:4).

On October 24, 1979, Wren asserted a grievance against Spurlock in which she listed over forty instances of alleged verbal assaults, false or exaggerated observation reports, unfair treatment, undeserved criticism, intimidation and other forms of harrassment (P/Ex.230). Wren claimed Spurlock's response to her were words to the effect he would be after her job (V:371). This grievance was reviewed by the school superintendent, Dr. Simmons. Dr. Simmons met with Wren and Spurlock to discuss the specifics of Wren's charges (V:372). Spurlock accused Wren

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[3]In addition to the WEA letter, Wren claimed that a grievance she filed against Spurlock on October 24, 1979, was an act of protected speech (I:1). However, the Tenth Circuit did not discuss this aspect, considering the WEA letter as the only alleged protected speech at issue.

of not following the rules and regulations of the school. Following the meeting, Dr. Simmons set forth his conclusions and recommendations, finding that Wren either did not understand her role as a teacher, did not perceive she was causing problems or refused to follow the rules and regulations developed by Spurlock (P/Ex.230). In addition, Simmons found that Spurlock may have erred by not clearly setting forth the rules or enforcing the rules in a consistent manner (*Id.*). Dr. Simmons recommended that Spurlock state the rules and policies consistently and that Wren should follow the rules (*Id.*). He urged both to work out their differences (*Id.*).

Dr. Simmons warned Wren that her continued refusal not to follow the rules would be a basis for her dismissal (V:373). Spurlock suggested that Wren should resign (V:374). The school board thereafter reviewed her grievance and instructed both Wren and Spurlock to make an extra effort towards mending their "personality conflicts" (P/Ex.73:1-2).

Thereafter, relations between Spurlock and Wren temporarily improved until February, 1980, although Wren still complained of certain incidents with Spurlock in December, 1979 (V:376; P/Ex. 176:2). Wren claimed that by February, Spurlock "went back to his usual self" in his critical observation reports (V:376). Wren further complained that Spurlock was continuing to harrass her by singling her out for criticism, by applying the rules differently to her than to other teachers and by conducting numerous classroom observations of her (P/Ex.176).

Wren's relationship with Spurlock deteriorated to the point where she initiated a plan to write the WEA to complain of Spurlock's conduct and to seek an investigation of him (V:380). In furtherance of her plan, on April 19, 1980, Wren and eight other teachers sent a letter to the union setting forth thirty-six items of complaint (P/Ex.305). The nine teachers did not inform the other eight teachers of the letter (X:13). The effect of the letter was to split the faculty down the middle between the nine teachers who signed the letter and the eight teachers who supported Spurlock (*Id.*).

Wren considered twenty-two of the thirty-six items as relating to her own personal grievances against Spurlock (V:382-97; VI:4-13). These included allegations relating to Spurlock's emotional outbursts at faculty meetings, being humiliated by him at faculty meetings, suffering retaliation by him after deciding a matter against him, having difficulty in obtaining decisive answers from him, enduring his uneven treatment of teachers in the application of the rules, his intimidation, his improper use of observation reports, his unavailability to give proper direction to the faculty, his interfering with classes, his mercurial temperament, and his favoring certain teachers over others (*Id.*). While the vast majority of the complaints concerned personal teacher grievances, six allegations dealt with other matters: high turnover of teachers as a result of harrassment, having teachers search students for drugs, personal use of school bus and equipment, reports of verbal sexual harrassment of students and teachers, parental fear of retaliation if they spoke up, and community concern over inaction by the school board regarding the principal (P/Ex.176).

The WEA letter infuriated Spurlock, particularly as it concerned what he considered to be libelous allegations relating to his alleged verbal sexual harrassment of students and teachers; he threatened to sue Wren (VI:64-65).

Thereafter, the school board did vote to reprimand Spurlock on grounds relating to three of the thirty-six allegations: illegal or unauthorized use of a school bus, improper search for drugs of a female student by two female teacher employees under the direction of Spurlock, and improper discussions with students concerning their "private lives" (P/Ex.289-A).

After the WEA letter, Wren continued to complain of Spurlock's conduct toward her, contending he unfairly reprimanded her, harrassed her by making classroom observations, criticized her supervision of her students, accused her of splitting the faculty into two groups, criticized her grading book and, in general, treated her

rudely (P/Ex.176).

Spurlock was convinced the faculty split caused by the WEA letter had a very negative effect on the functioning of the school (XII:147). Students were taking advantage of the situation; in turn, teachers were pitting one student against another to support the teachers' positions (XII:147-48). In Spurlock's estimation the learning experience at the school was shut down (XII:148). Spurlock was concerned about what he considered to be the terrible dissension that was ripping the school apart (XII:186).

On May 14, 1980, a meeting was held at Spurlock's request among Spurlock, Dr. Simmons and Wren because of Spurlock's fear the school was coming to a halt as a consequence of Wren's conduct (IV:132-33). Both Wren and Spurlock were allowed to have another person present with them to act as witnesses (VI:35). Spurlock criticized Wren's failure to conduct her classes on time and her failure to properly supervise her students; he raised several instances of what he considered to be gross insubordination including leaving her class unsupervised at times when she was specifically told not to do so (P/Ex.296). Spurlock told Dr. Simmons that Wren's continued insubordination required a solution (*Id.*).

At the end of the meeting, Dr. Simmons noted that Wren had not been cooperative and was not following Spurlock's directives (*Id.*). He determined that her failure to follow the principal's rules had gone on all year and had reached a point to where he would no longer tolerate it; that Wren's actions had become serious enough to affect staff, students and the community (*Id.*). Dr. Simmons reminded Wren of her duty and responsibility to follow the rules and if they were not followed then more serious steps had to be taken (*Id.*). Although Spurlock had not sought to have Wren suspended (XII:132), Dr. Simmons concluded that a suspension with pay was warranted until a hearing with the school board could be arranged, and he so informed Wren (P/Ex.296). However, later that same day Dr. Simmons consulted with the school board's attorney who advised that Dr. Simmons had not followed proper procedures in the

suspension (IX:23). Dr. Simmons telephoned Wren that same afternoon and informed her that she was reinstated (VI:42). On May 17, 1980, Wren received a letter from Dr. Simmons which indicated that she could continue her classroom instruction while Dr. Simmons decided whether he would recommend to the school board that she be dismissed for reasons of insubordination (P/Ex.176).

On March 6, 1981, Wren filed another grievance against Spurlock based on over fifty allegations of improper conduct that had occurred since her last grievance of October 24, 1979 (*Id.*). Wren's list of personal grievances was drawn from a diary she kept on the advice of her union (VI:58-59). Again, Wren characterized Spurlock's behavior as constituting harrassment, unfair criticism and intimidation (P/Ex.176). Wren attributed only seven of these events to harrassment directly pertaining to her participation in the WEA investigation (VI:56-74). Wren's criticism in the main, as before, related to Spurlock's alleged improper classroom observation of Wren, rude conduct toward her, unfair application of the regulations to her, and general unprofessional treatment of her (P/Ex.176).

In a document dated March 11, 1981, Spurlock recommended that Wren's contract not be renewed for the next year, setting forth his reasons in a detailed account of Wren's performance as a teacher since April 27, 1976 (D/Ex.B1). The school board rejected Spurlock's recommendation; however, the school board did vote to reprimand Wren (Supp. II:41.45).

While the school board did renew Wren's contract, on August 5, 1981, Wren requested a one-year leave of absence citing as her reasons a two-year period of "pressures at work" commencing one year before the WEA letter (*Id.*; P/Ex.254). Wren was granted a one-year leave of absence without pay (VI:87-88). Wren made a subsequent request for a second year's leave of absence after Spurlock left the school, which the school board did not grant; however, at the time of trial she still had the opportunity to return to the school if she desired (IX:130-33).

Wren had experienced medical problems from the beginning of her teaching career in 1974 (D/Ex.FF1). These problems, she believed, stemmed from the pressure of full time teaching, as well as increasing marital problems and problems with her son (*Id.*). By the end of the 1974-75 school year, she told her doctor that she was overreacting and having "hang ups" and had reached the point where she felt "rung out, tired constantly, have a hard time sleeping, and too nervous and cry a lot" (*Id.*). She felt she could not last much longer (*Id.*).

Wren had been suffering from longstanding depression that she experienced even prior to her teaching career (XI:116; Supp.III:83). She had sought professional help in coping with her emotional problems as far back as 1975 (VI:115-16). She further attributed her problems to what she felt were the many years of harrassment and intimidation by Spurlock during which time she believed she and other teachers had been singled out because they had resisted Spurlock's behavior and criticisms; that she had become agitated and depressed after years of such harrassment (P/Ex.298).

Wren and her psychiatrist testified that her alleged emotional injuries resulted from the "cumulative" effect of her ongoing conflict with Spurlock, her "suspension," and her inability to receive relief for her grievances from the school district (VI:103-04; Supp.III:82-84).

The trial of this matter commenced on May 16, 1983. On May 25, 1983, after seven days of testimony, Plaintiff settled with defendants Simmons and the school district in the amount of $125,000 (II:346; XI:4-10). All testimony thereafter was completed in less than two and one-half days (XI; XII; XIII). The settlement agreement provided that the settlement amount was in "full and complete payment of the pro rata share of Simmons and the school district for any and all damages which she contends are due to her from Defendant's [sic] Simmons, school district [sic]. . ." The document also made reference to releasing any claim for attorneys' fees (II:346). The jury was informed of the fact of settlement, but not its amount, and thereafter was

"instructed specifically that you must make no assumptions from this fact" (XI:11). The trial court then explained that "[p]eople settle lawsuits for many, many reasons. And not all are connected with the issues of the case that is before us. So you must assume nothing from the fact that it's been done" (*Id.*).

The trial court did not decide the *Pickering* balance, but instead, instructed the jury to resolve it (XIII:144). That court further instructed the jury to determine whether Wren's "speech", without specifying with particularity which speech, was a substantial or motivating favor in Spurlock's alleged retaliation (XIII:145). In this regard, the court directed special interrogatories to the jury (XIII:160-62). One was compound in nature (XIII:161). In a single query it addressed both Spurlock's intent to deprive Wren of her constitutional rights "or" his intent to cause "other injury" (*Id.*). The very next special interrogatory given to the jury directed determination regarding what sum of money would fairly compensate Wren for "any injuries" she suffered as a result of Spurlock's "unlawful actions" (*Id.*).

The jury found in favor of Wren and against Spurlock in the amount of $113,000 in compensatory damages and $7,500 in punitive damages (II:290). The trial court thereafter refused to reduce the judgment by the amount of the prior settlement with defendants Simmons and the school district on the grounds of "divisible" injury (II:370-73).

Petitioner appealed to the Tenth Circuit on the grounds, *inter alia*, that proper application of the *Pickering* balance rendered any alleged First Amendment speech unprotected, that Wren failed to prove that the exercise of a First Amendment right was the substantial or motivating factor in Spurlock's alleged retaliation, that the trial court erred in failing to reduce the judgment by the amount of the prior settlement of co-defendants, and that the trial court committed plain error in its special interrogatories to the jury.

The Tenth Circuit affirmed the trial court (*see* Appendix). The court below understood the necessity of applying the *Pickering* test to First Amendment speech to determine whether the speech was constitutionally protected. While the Tenth Circuit recognized that it was error for the trial court to allow the jury to resolve the *Pickering* balance, it determined such error did not require reversal because the jury implicitly reached the correct result (A-6).[4] However, its own *Pickering* analysis consisted only of relying on its conclusion that the school authorities were satisfied with Wren's teaching and that Wren was competent. The Tenth Circuit did not comment on the fact that one of the last acts of the school board while Wren was still employed was to reprimand her while still agreeing to renew her contract. The Tenth Circuit found that "in view of this evidence of Wren's continuing competence, the *Pickering* balance tips in her favor" (A-7). The court below gave no further consideration to the *Pickering* balance.

The Tenth Circuit next considered whether the special interrogatories, which had not been objected to at trial, constituted "plain error" (A-11). After citing the fact that it had refused to review "more obvious ambiguity in special jury instructions," the court concluded that the jury "repeatedly received accurate information on the nature of the case and on the necessity for finding a violation of Wren's constitutional rights before awarding damages" (A-12).

The Tenth Circuit, in addition, upheld the trial court's determination that Wren's injury and resulting damages were "divisible and therefore capable of apportionment by the jury" (A-16). It reasoned there were numerous instances of alleged harrassing and retaliatory conduct by Spurlock alone, as well as instances where the school district or superintendent had acted on his advice (A-17). The court further noted that the jury had been informed of the fact (while not the amount) of settlement and that Spurlock's counsel in closing argument had attempted to separate

[4]Reference is to page numbers in the Appendix.

Spurlock from the responsibility of the now-dismissed co-defendants (*Id.*). The trial court, it further stated, instructed the jury on the necessity of finding Spurlock's conduct to be the proximate cause of Wren's injuries (*Id.*).

The Tenth Circuit did recognize that the nature of Wren's injuries, problems and "resulting loss of employment" was not obviously divisible, however it concluded that this difficulty was not Wren's fault. The court cited the fact that courts had been liberal in allowing juries to award damages in situations where the uncertainty of apportionment arises from the nature of the wrong (*Id.*).

The Tenth Circuit accordingly affirmed the trial court's judgment.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT MISAPPLIED THE *PICKERING* BALANCE BY FAILING TO GIVE ANY CONSIDERATION TO THE GOVERNMENT'S INTEREST IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

Despite this Court's admonition in *Connick v. Myers*, 461 U.S. 138 (1983), that the balance test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), requires *full* consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public, the Tenth Circuit failed to give *any* such consideration. The Tenth Circuit's analysis was in direct conflict with *Connick* and resulted in a patent misapplication of the *Pickering* balance.

In determining whether a public employee's First Amendment rights have been violated, a court must decide whether the employee has shown that he engaged in protected activity. This determination raises a question of law. *Connick*, 461 U.S. at 148 n. 7 (1983). While the Tenth Circuit did recognize that the trial court erred in leaving determination of this issue to the jury, it nonetheless found that reversal was not required, holding that the jury implicitly reached the correct result.

However, the Tenth Circuit failed to address any of those factors this Court has said were relevant: (1) the need for harmony in the workplace; (2) the importance of close working relationships with co-workers; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose. *Connick*, 461 U.S. at 150-54. Instead, the Tenth Circuit relied on only one factor, not previously recognized by this Court — the employee's competence.[5] In

[5]In *Pickering*, this Court did mention the subject of the teacher's competence, in a different context, noting that statements so without foundation as to call into question the teacher's fitness to perform his duties would be evidence relating to general competence, and not an independent basis for dismissal. 391 U.S. at 574 n. 5.

Pickering and *Connick* this Court addressed pertinent matters relating to the nature of the disruption caused by the First Amendment speech and its effect on the working environment. In contrast, the Tenth Circuit's consideration, limited to employee competence, was wholly unrelated to such matters. The court below failed to understand that even a competent employee can have the *Pickering* balance tipped against him after full consideration is given of the government's interest. In determining employee competence to be the relevant deciding factor, the Tenth Circuit's reliance on that factor was still questionable because it gave little importance to the fact the school board voted to reprimand Wren while still renewing her contract.

Having failed to properly apply the *Pickering* balance, the Tenth Circuit erroneously held: "In view of this evidence of Wren's continuing competence, the *Pickering* balance tips in her favor" (A-7). With that the court below ended its *Pickering* analysis. By failing to follow the dictates of this Court, the Tenth Circuit not only misapplied the *Pickering* balance, but introduced into the analysis an unrecognized and irrelevant factor of competence. The court below left unexplained its reason for concluding that such factor was relevant to the *Pickering* test, perhaps because no reason exists.

The decision of the Tenth Circuit, if left uncorrected, will establish a dangerous precedent that undermines the guidelines of this Court in resolving an issue of critical importance to all public administrators. Plenary consideration by this Court is essential, particularly where the record below is replete with evidence that should have been addressed in giving full consideration of the government's interest: a small, one-building school with only seventeen teachers, requiring harmony in the workplace and close working relationships among the employees; a context in which the teacher had longstanding, preexisting conflicts with the principal arising from the principal's attempts to administer school policy; and where the WEA letter created a deep division in the faculty and, in the principal's opinion, caused the learning experience of the school to shut down.

II. CONTINUED CONFLICT BETWEEN SUPERVISOR AND EMPLOYEE, WHERE THE EMPLOYEE'S EMPLOYMENT IS NOT THEREBY AFFECTED BY TRANSFER, SUSPENSION, DEMOTION, TERMINATION, OR REDUCTION OF BENEFITS, DOES NOT RISE TO A LEVEL OF CONSTITUTIONAL INFRINGEMENT.

The Tenth Circuit held there was sufficient evidence of Spurlock's retaliatory motivation. It cited the following post-WEA letter conduct: that Spurlock had requested the meeting with the superintendent which resulted in the momentary suspension of Wren by the superintendent (although Spurlock never requested that such action be taken); that friction had increased between Wren and Spurlock; and that Spurlock had recommended for the first time that Wren be terminated (which the school board rejected). Implicit in the Tenth Circuit's decision is the legal conclusion that such evidence constituted retaliation sufficient to rise to a level of constitutional infringement.

While this Court has not previously attempted to set forth guidelines for lower courts to follow in determining at what point the level of constitutional infringement is reached in First Amendment retaliation cases, this Court has discussed the problem in terms of whether the adverse action taken by the defendant is likely to chill the exercise of constitutionally protected speech. Circuit courts have required that the employment condition be affected in some substantially meaningful way before a level of constitutional infringement is attained. Thus, in addition to termination, courts have recognized transfer, suspension, denied promotion, demotion or reduction of benefits as constituting unconstitutional infringement. *See, e.g., Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986) (demotion); *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983) (suspension); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (denied promotion); *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. 1981) (denied salary increases); and *Rosado v. Santiago*, 562 F.2d 114 (1st Cir. 1977) (transfer).

At issue is what minimum degree of altered

employment conditions must be caused by retaliatory conduct before unconstitutional infringement of protected speech arises. Direction from this Court is imperative.

This Court in *Connick* warned against attempts to constitutionalize the employee grievance. The Tenth Circuit's implicit extension of the parameters of unconstitutional conduct, combined with its failure to consider the government's interest, can only lead to further constitutionalizing of employee grievances if left uncorrected. Consideration by this Court is essential.

III. THE TRIAL COURT'S INSTRUCTIONS WERE PLAINLY ERRONEOUS BECAUSE THEY PERMITTED THE JURY TO FIND LIABILITY ON EITHER A CONSTITUTIONAL OR NON-CONSTITUTIONAL BASIS AND PERMITTED RECOVERY FOR BOTH CONSTITUTIONAL AND NON-CONSTITUTIONAL INJURIES.

A miscarriage of justice occurred as a result of the instructions given by the trial court. The Tenth Circuit found no reversible error occurred with respect to those trial instructions objected to, and no "plain error" as to those instructions not objected to. However, the instructions taken as a whole were the generating factor which culminated in a verdict not warranted under the law and, therefore, constituted plain error. *See Pridgin v. Wilkinson*, 296 F.2d 74, 76 (10th Cir. 1961).

The trial court's instructions failed to specify the particular constitutionally protected speech involved, misled the jury, and in several instances pertained to matters totally unrelated to the issues at trial. An overall review of the instructions reveals that substantial injustice resulted. For ease of reference, each instruction is paraphrased and set forth hereafter in categories and in the order given by the court:

(A) That Wren sought damages for Spurlock's retaliation against the following exercise of "constitutional" rights: (1) the right to her own

philosophy, opinions and expression of views contrary to those favored by Spurlock; (2) her right of association and free speech in seeking assistance from the WEA and in actively participating in the WEA's investigation of the Baggs school; and (3) her right to file the October 24, 1979, grievance requesting a hearing by the school board into matters pertaining to her treatment by the principal. (XIII:137-38)

(B) That the nature of the claimed retaliation consisted of threats of loss of employment, threats of lawsuits, changes in classes, selective application of rules and policies as applied to Wren, requests to have Wren suspended or terminated, cautioning of other teachers not to associate with Wren, and making teaching conditions intolerable so that she was unable to continue. That as a result of the retaliation and harrassment "over a period of years," Wren suffered emotional problems which eventually led to her need for a leave of absence, and suffered lost income because of her inability to work, emotional suffering, injury to her standing in the community, damage to her professional career, embarrassment and humiliation. The court then instructed on the punitive damage claim and Spurlock's defenses. (XIII:138-40)

(C) That the elements of a 42 U.S.C. § 1983 suit were: (1) that Spurlock knowingly deprived Wren of constitutional rights; (2) that the jury could presume Spurlock acted pursuant to state law; and (3) that Spurlock's acts were the proximate cause of injury and subsequent damage to Wren. (XIII:140-42)

(D) That while Wren had alleged a violation of several different constitutional rights, she need not prove violation of all such rights, but was entitled to recover if any one of the constitutional rights was "a factor in any retaliation" by Spurlock. (XIII:143)

(E) That protected speech involved matters of political, social, or other public concern, and the jury was to balance the interests of the employee in commenting on matters of public concern against the

right of the employer to remove disruptive influence (i.e., apply the *Pickering* balance). (XIII:143-44) The court then informed the jury that it had ruled "that in part the matters upon which the plaintiff sought to speak were matters of public concern in the community in which she was teaching." (XIII:144) These "matters" were never specifically identified to the jury.

(F) That no public employee could be dismissed or retaliated against for a constitutionally invalid reason and in determining whether retaliation was taken "for reasons infringing upon [Wren's] constitutionally protected right of free speech and freedom of association" the jury was to determine: (1) whether the activity or speech was the motivating factor, (2) whether the activity or speech was constitutionally protected, and, if so, (3) whether the employer's actions would have been taken even in the absence of such speech or activity. (XIII:145) The court did not determine which activity or speech was protected.

(G) That Spurlock could not retaliate against Wren for her actions "in associating with other teachers or for her membership or activity in the Wyoming Education Association." (XIII:146)

(H) That Spurlock did not have a right of absolute control over the expressions of the faculty nor require a teacher to refrain from dissent, criticism or disagreement. (*Id.*)

(I) That Wren "may not be punished for holding ideas or philosophies contrary to those held by a school administrator" and that a teacher "has some measure of academic freedom in the classroom" as well as a civic right to freedom of speech both outside and inside the school. (*Id.*)

(J) That a teacher cannot be "terminated" for "using a particular teaching method unless "put on notice" of the problem. The court then instructed, "[i]f you find the plaintiff was discharged or otherwise

penalized for the use of such a teaching method without first receiving such notice, then the plaintiff may have been denied rights protected by the United States Constitution." (XIII:146-47)

(K) That a tenured teacher "has a reasonable expectation of continued employment"; that when a district "intends to terminate the employment," it must follow certain procedures required by law, which the court outlined; that under Wyoming law a tenured teacher could be terminated for just cause, which the court specified. (XIII:147-48) The court then instructed in detail the hearing procedures that would have to be followed to terminate a tenured teacher. (XIII:149)

(L) That the jury determine whether Spurlock had qualified immunity. (XIII:149-50)

(M) The court then instructed on proximate cause "of an injury," and further instructed that the law does not provide for only one proximate cause, but that two or more persons may operate simultaneously to cause injury and in such case each may be a proximate cause. (XIII:150-51)

(N) The court next instructed on assessing the amount of damages "accrued because of the unlawful deprivation of the constitutional rights" of Wren. (XIII:151)

(O) The court then instructed on aggravation of a preexisting injury and on the duty to mitigate. (XIII:151-52)

(P) The court next instructed on nominal damages; that attorneys' fees should not enter into the jury's determination; and that punitive damages may be awarded under circumstances of malice, wanton conduct, or oppressive conduct. (XIII:152-55)

(Q) The court finally instructed that an instruction on damages was not an indication that a party is entitled to a verdict and that the jury was to consider

only the evidence in the case. (XIII:155-60)

Spurlock objected, in whole or in part, to the instructions in categories (B), (D), (E), (G), (I) and (J). (XIII:161-64)

The jury received six special interrogatories (XIII:160-62), requiring "yes" or "no" answers, as follows:

> 1. Did the defendant, Nyles Spurlock, subject the plaintiff, Lois Wren, to the deprivation of any rights, privileges or immunities secured or protected by the Constitution under the laws of the United States?

This interrogatory addressed all three alleged exercises of constitutional rights at issue (set forth in category (A), *infra*.) However, only one of the three (that relating to the WEA) is cognizable under the Constitution because the other two did not involve matters of public conern.

> 2. If you answered yes to number one, were the defendant Spurlock's actions a proximate cause of any damages?

The jury was permitted to answer affirmatively if it believed Spurlock caused "any damages," even non-constitutional injury. The court did not instruct that only Spurlock's actions directed against the WEA letter, being the only protected speech at issue, could be a basis for a finding of liability. Thus, the interrogatory could be answered "yes" even if the jury believed "any damages" were caused by any such actions directed at the constitutional rights asserted involving non-constitutionally protected conduct.

> 3. Did the defendant, Mr. Spurlock, know or should he reasonably have known that the actions he took within the sphere of his official responsibility would violate the constitutional rights of the plaintiff?

This pertained to the immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

> 4. Did the Defendant, Nyles Spurlock, take the actions complained of by the Plaintiff with malicious intention

> to deprive the Plaintiff of her Constitutional rights or cause other injury?

As in interrogatory (2), the jury was allowed to consider non-constitutional conduct in determining Spurlock's motive as it related either to Wren's constitutional injury or to Wren's "other injury."

> 5. What sum of money would fairly compensate the Plaintiff for any injuries she has suffered as a proximate result of the Plaintiff's [sic] unlawful actions? $_____

In furtherance of interrogatories (2) and (4), the jury was allowed to award Wren compensation for *any* injuries resulting from *any* conduct of Spurlock which the jury deemed unlawful, whether attributable to constitutionally protected or unprotected activity.

> 6. [An interrogatory regarding punitive damges.]

Although Spurlock did not object to the special interrogatories at trial, this issue was raised with the Tenth Circuit under the "plain error" rule. The Tenth Circuit declined to apply the rule on the basis that any "ambiguity" was not obvious enough for such review and because the jury "repeatedly received *accurate* information on the nature of the case and on the necessity for finding a violation of Wren's constitutional rights before awarding damages" (A-12) (emphasis added). The Tenth Circuit did not identify which information the jury received that conveyed the accurate nature of the case. A perusal of the instructions demonstrates, instead, the substantial *inaccuracy* of the information the jury received.

The trial court's failure to properly and specifically instruct the jury on the basic elements of the particular constitutional injury involved resulted in substantial injustice to Spurlock. Anytime the court attempted to give guidance on this matter — *see* categories (A), (E), (H), (I) and (N), *infra* — the court allowed the jury in all instances to speculate for themselves on what constituted protected

conduct and what actions of Spurlock had constitutional significance. The court allowed the jury, in category (A), to consider the plaintiff's purported constitutional rights involved in her own philosophy and her first grievance, notwithstanding that such matters concerned solely personal matters and not protected speech. The trial court further failed to specify the relevant constitutional issues by allowing the jury, in category (E), to apply the *Pickering* balance to a vast category of speech undistilled by the *Connick* test. The court merely ruled that "in part" the "matters" upon which the plaintiff sought to speak were matters of public concern and did not provide any further limitation. Given this lack of direction by the court, the jury was allowed to consider all of Wren's speech as being constitutionally protected. At this point, a finding of liability against Spurlock was virtually assured.

Moreover, the damages or injuries identified in interrogatories (2), (4) and (5), culminating in the dollar amount for "any injuries" in interrogatory (5), could flow from all three purported "rights" as well as any "other injury." Thus, the basic purpose of § 1983 damages, to compensate persons for *injuries* that are caused by the deprivation of protected *constitutional* rights, *Memphis Community School Dist. v. Stachura*, ____ U.S. ____, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986), citing *Carey v. Piphus*, 435 U.S. 247, 254 (1978), was thwarted because the Tenth Circuit allowed recovery for injuries other than constitutional injury.

Other instructions also misled the jury: that Wren could not be punished for her ideas (even though ideas without expression are irrelevant under the Constitution) (category (I)); that a teacher has "some measure" of academic freedom in the classroom (although this "measure" was left entirely to the jury's discretion) (category (I)); and that "termination" and "tenure" were facts to be considered (categories (J) and (K)) (notwithstanding Wren's job had been held for her). Ultimately, the Tenth Circuit did not respond to whether the questioned instructions properly related to relevant issues but merely stated, "an instruction is proper if

supported by competent evidence" (A-13).

A different panel of the Tenth Circuit has recently discussed the need for a trial court to specifically define what conduct receives constitutional protection. *Ewers v. Board of County Commissioners*, No. 84-2437 and 84-2477 (10th Cir. Oct. 2, 1986), to be reported at 802 F.2d 1442. *Ewers* involved a § 1983 complaint based on the elimination of a county road superintendent's position. Ewers contended that he was terminated because of retaliation for the exercise of his First Amendment right to free speech. The trial court instructed the jury that the court had determined Ewers had generally engaged in constitutionally protected speech (Slip op. at 8). The Tenth Circuit held that this instruction was too broad because it allowed the jury to consider all of Ewers' speech as protected from retaliation, therefore the jurors were not directed to properly apply the *Mt. Healthy City School v. Doyle*, 429 U.S. 274 (1977), test[6] (*Id.*). "Jurors must be knowledgeable of the 'protected conduct' (or speech) in order to find the conduct was a 'motivating factor' in the action being challenged" (Slip op. at 9). Had the Tenth Circuit applied this reasoning to the case at bar, substantial injustice would have been avoided.

IV. A SINGLE CONSTITUTIONAL INJURY IN THE FORM OF EMOTIONAL DISTRESS IS INDIVISIBLE AND REQUIRES A SET-OFF.

This Court has not previously addressed the issue of whether a defendant is entitled to have a judgment against him reduced in the amount paid by settling codefendants who were alleged to have jointly caused the same constitutional injury.[7] The constitutional injury alleged herein was emotional distress. The Tenth Circuit

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[6]The test set forth in *Mt. Healthy* requires a plaintiff in a First Amendment retaliation case to prove (1) that the speech was constitutionally protected and (2) the speech was a substantial or motivating factor. 429 U.S. at 287.

[7]Rule 60(b)(6) of the Federal Rules of Civil Procedure provides for relief from judgment for any reason "justifying relief from the operation of the judgment."

erroneously held that there was no right to set-off because of the existence of a "divisible" injury.

Because this Court has not previously set forth guidelines in distinguishing an indivisible injury from a divisible injury, the Tenth Circuit provided its own analysis. It arrived at its conclusion on the basis of the following findings that either are irrelevant to the issue of whether Wren's injury was indivisible or are contradicted by the record:

1. "The evidence . . . contained numerous instances of allegedly harrassing and retaliatory conduct by Spurlock alone, as well as instances when the school district or superintendent had acted on his advice" (A-17). This simply underscored the concept of joint and several liability which conformed to the nature of Wren's allegations. It does not speak to the nature of the injury, i.e., emotional distress, and whether Wren recovered from Spurlock and the other defendants more than once for the same injury.

2. "There was no injustice to Spurlock [because] [t]he jury was told immediately that there had been a settlement [and] the court explained that it did not affect the claims against Spurlock" (*Id.*). Again, this bears no relevancy to whether the nature of the injury involved lends itself to apportionment. Furthermore, the trial court specifically instructed the jury it was to make no assumptions from the fact of settlement, noting that suits were settled for many reasons, not all of which were connected with the issues of the case. The trial court again reminded the jury it was to assume nothing from the fact that a settlement had been effected. The court never told the jury of the amount of settlement. Thus, even if the injury of emotional distress were subject to apportionment, there was no basis for the jury to determine if the released defendants paid anything, and, if so, what amount. Consequently, the jury had no choice but to consider a verdict addressing the *totality* of Wren's injury.

3. "The court explicitly instructed the jury on the necessity of finding *Spurlock's* conduct to be the proximate

cause of Wren's injuries" (*Id.*) (emphasis in original). Again, this had nothing to do with whether the injury in the form of emotional distress was subject to division. The trial court in defining proximate cause for the jury explained that the conduct of two or more persons may operate simultaneously either independently or together to cause the injury, and, in such cases, *each* may proximately cause the same injury. Thus, this instruction simply focused on the fact that Spurlock's liability depended on his conduct being a "cause" of the injury and had no relevance to whether the resulting injury could be apportioned among all defendants.

At the conclusion of the evidence the trial court even rejected Spurlock's request for an allocation of damages, as well as a tendered verdict form that allocated damages. This action was proper only under circumstances of "indivisible" injury, not divisible injury as later found by the trial court.

4. "During closing argument, Spurlock's counsel attempted to separate his client from and emphasize the responsibility of the now-dismissed codefendants" (*Id.*). Again this had nothing to do with the nature of the injury. This related only to the issue of whether Spurlock would be held liabile for the acts of the two dismissed defendants. Moreover, after having been rebuffed in his attempt to have an instruction given on damage apportionment, Spurlock's counsel had little choice but to speak to the issue of *no* liability as opposed to that of apportionment of damages in the event liability were found.

5. "The harm to Wren, i.e., her mental problems and resulting loss of employment, is not obviously divisible into those discrete portions attributable to Spurlock and those not so attributable. But that difficulty is not Wren's fault" (*Id.*). This is the *only* factor cited by the Tenth Circuit that relates at all to the nature of the injury. However, the fact that the nature of her injury was not Wren's fault is irrelevant to the issue of whether her injury was indivisible, and does not justify Wren recovering more than once for the same injury.

6. "[C]ourts have been liberal in allowing juries to

award damages in situations when the uncertainty of apportionment 'arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible'" (*Id.*). This is a true statement; however, its focus on the nature of the *wrong*, instead of the nature of the *injury*, was misplaced. This simply justifies a holding of joint and several liability but has no relevance to the issue of indivisibility. Once one joint and severally liable defendant pays for the entire injury, plaintiff cannot thereafter recover for the same injury from any other defendant who may be liable to her.

As demonstrated, none of the Tenth Circuit's grounds supports its legal conclusion of "divisible injury." Wren brought her complaint jointly against Spurlock, Simmons and the school board, and, in her complaint, did not attempt to distinguish the alleged unconstitutional conduct of one defendant from the other. Furthermore, Wren alleged at trial a singular injury in the form of emotional distress that impaired her ability to work, and attributed it to the conduct of all defendants.[8] At trial, seven of the nine and one-half days of testimony were devoted to demonstrating that the conduct of all three defendants caused a singular injury. The testimony of both Wren and her psychiatrist made clear that her emotional injury was the result of the *cumulative* actions of *all* defendants. Even after settlement, there was no attempt during the remaining two and one-half days of testimony to divide the injury between Spurlock's conduct and that of the settling codefendants.

In addition, the Tenth Circuit erroneously assumed that the right of set-off was dependent upon the right of contribution. Such is not the case. Contribution involves the right of a *tortfeasor* to receive payment from a joint tortfeasor where he has paid the plaintiff more than his *pro rata* share of the common liability. The plaintiff is presumed to have recovered only once for his injury. On the other hand, a set-off is premised on the theory that the *plaintiff* should not recover more than once for the same injury and,

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[8]While Wren alleged in her complaint damage to her reputation, this was not pursued in any meaningful way at trial.

therefore, a tortfeasor is entitled to have the judgment against him reduced by the amount paid to the plaintiff by any settling joint tortfeasors.

While the Tenth Circuit's metaphor of "two defendants struggl[ing] for the same gun and succeed[ing] in shooting the plaintiff," supports its conclusion that "unquestionable indivisible harm" results therein (A-17), such metaphor fails to explain the court below's finding of divisible injury in the case at bar. To the contrary, such metaphor is closely analogous to the instant case which similarly requires a finding of "unquestionable indivisible harm." In both instances the nature of the injury precludes division.

Restatement (Second) of Torts § 433A, provides that a single injury may be divisible only if there is a reasonable basis for apportioning the injury among various causes. It gives as an example: if cattle from two owners pass upon another's land and destroy his crop, the lost crop may be apportioned among the owners of the cattle on the basis of the number owned by each. *Id.*, comment d. The nature of the injury lends itself to apportionment because of an ability, through mathematical calculation, to determine the crop damage attributable to each owner. However, the injury to Wren's emotional landscape does not yield itself to any such mathematical apportionment. Such an injury thus must be "indivisible."

V. THE DECISION BELOW RAISES MATTERS OF SUBSTANTIAL IMPORTANCE.

The Tenth Circuit's opinion sanctions preclusion of the government's interest in determining the protection to be afforded First Amendment speech. If left unchanged, this precedent reasonably can be expected to encourage future district and appellate courts to skew the *Pickering* balance in favor of the employee. The net result opens a Pandora's box of constitutionalized employee grievances.

This Court has clearly delineated protected speech as involving matters of public concern that satisfy the *Pickering* test. Particularly in the field of public education,

it is manifestly important when applying this balance to give full consideration to the interests of the school boards and principals in their increasingly difficult attempts to maintain normal discipline among teachers without triggering intimidating lawsuits that portend significant exposure to substantial damages. In *Paul v. Davis*, 424 U.S. 693 (1976), this Court warned against § 1983 becoming a font of tort law to be superimposed upon the state's tort system. It is clear, however, that lower courts such as the Tenth Circuit, if left unchecked, will erode the *Pickering* balance to the point where an employee, by the simple expedient of including in his personal grievance matters that can be construed as relating to the public concern, can thereby bootstrap a typical employee grievance into one of constitutional dimension. Furthermore, it is important at this juncture for this Court to clearly delineate the degree of retaliatory conduct required before a First Amendment § 1983 claim arises.

Any attempt by the courts below to unfairly tip the *Pickering* balance by ignoring the government's interest must be immediately corrected by this Court. As exemplified in the case of bar, a teacher may be awarded a sizeable recovery on the sole basis of her First Amendment claim while never having had her position denied her, but voluntarily leaving it and refusing to return when having the opportunity to do so, even after the principal who allegedly harrassed her had left. Yet her problems with her principal were substantially the same throughout her seven year employment at the school and her actions in her last two years deeply divided the small rural school and brought its functions to a virtual halt. These matters were never considered by the lower courts in determining the balance between the teacher's and principal's interests.

If protected speech is not implicated, teacher Wren still would have had the right to sue her principal for common law torts on the basis of what she perceived to be over six years of abuse. Of course, she did include such allegations in her original complaint. Her decision to withdraw the two state law torts and proceed only on the civil rights claim manifests the problem now created by the Tenth Circuit of

constitutionalizing what essentially was an employee grievance.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 9, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 83-2446

LOIS E. WREN,

Plaintiff-Appellee,

v.

W. NYLES SPURLOCK,

Defendant-Appellant,

HUGH SIMMONS AND
CARBON COUNTY SCHOOL DISTRICT NUMBER ONE,

Defendants.

August 11, 1986

Theodore S. Halaby (Ronald M. Sandgrund and Cynthia M. Mardian with him on briefs), of Halaby & McCrea, Denver, Colo., for defendant-appellant.

Michael H. Gottesman (Robert M. Weinberg, of Bredhoff & Kaiser, Washington, D.C., and Patrick Hacker, Cheyenne, Wyo., with him on briefs), for plaintiff-appellee.

Before McKAY, McWILLIAMS, and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This appeal is from a judgment for plaintiff in a case arising under 42 U.S.C. § 1983. Defendant W. Nyles Spurlock, a public school principal, challenges a jury award of $113,000 compensatory and $7,500 punitive damages to

plaintiff Lois E. Wren, a teacher who contended at trial that Spurlock harassed her in retaliation for her exercise of First Amendment rights.

Spurlock alleges that the trial court committed several errors in the conduct of the trial: (1) it should have granted a defense motion for directed verdict on at least one of three issues; (2) it incorrectly handled one witness's comment labeling Spurlock a "sociopath"; (3) it submitted to the jury a special interrogatory that was compound and confusing; and (4) it made several errors in instructing the jury. Additionally Spurlock argues that the compensatory and punitive damage awards were excessive and that he was entitled to a setoff of settlement payments made to Wren by former codefendants, because Wren's injury was indivisible. We affirm.

I.

Spurlock and Wren worked together for several years at the only public school in Baggs, Wyoming, a community of approximately 600. The history of their relationship is a rocky one. For several years before Wren filed her first administrative grievance against Spurlock in October 1979, he had alleged that she allowed her health and other personal concerns to interfere with her duties, and had not followed his instructions on school policies. They had clashed over, among other things, science fair regulations, Wren's sponsorship of the yearbook, and inventory and ordering methods. Yet Spurlock characterized their differences before 1979 as minor, and he recommended that Wren's teaching contract be renewed every year from her return to full-time teaching in 1974 until after she called for the Wyoming Education Association (WEA) to investigate Spurlock in 1980.

Wren's first grievance filed under the school district's published procedure alleged that Spurlock harassed and intimidated her, and hampered her classroom performance. After a meeting between Spurlock and Wren and an investigation by the school superintendent, the school district board of trustees held a December 1979 hearing and

directed both parties to make an "extra effort" to mend their personality conflict. In addition, Wren was told specifically to follow Spurlock's directives and he was told to make sure such directives were clear and enforced equally. Wren and Spurlock both testified that their relationship improved for a few months after the grievance.

By the end of the 1979-80 school year, however, the tension had returned. In April 1980, Wren's name appeared with those of nine other teachers on a letter listing thirty-five separate issues and seeking a WEA investigation of Spurlock's performance. At this point and shortly thereafter, numerous witnesses for both sides testified, there was dissension on the Baggs faculty and widespread community concern over the school. Several teachers testified that Spurlock's evaluations of them became more negative and his enforcement of school rules regarding them more restrictive after they assisted Wren with her first grievance or signed the WEA letter. One of these teachers and Wren were suspended for approximately half a day with pay on May 14, 1980, the day after the district teachers' association endorsed the call for the WEA investigation. Spurlock and the superintendent denied that they had known of the association action before the suspensions.

It is undisputed, however, that the friction between Wren and Spurlock increased during the following school year, during which Spurlock was reprimanded as a result of the WEA investigation. The continuing dispute led to Wren's second administrative grievance and Spurlock's first recommendation that Wren's contract not be renewed. The school board rejected Spurlock's suggestion and renewed Wren's contract in March 1981, voting only to take "strong action" to discipline her. Wren's second grievance was closed later for an alleged failure to comply with district time limits.

Wren then requested a leave of absence upon the recommendation of her psychiatrist, which was granted without pay or fringe benefits. The board denied her request for an extension of the leave but never took any other formal action on her status after her refusal to return to work.

During the second week of trial, Wren executed a $125,000 settlement agreement with Spurlock's codefendants, the school district and the superintendent, who were then dismissed from the case. Spurlock did not seek a mistrial but has argued repeatedly that he is entitled to a setoff of the damage award in the amount of Wren's settlement with the district and superintendent.

II.

Spurlock's first argument — that he was entitled to a directed verdict — can survive only if all the inferences to be drawn from the evidence are so patently in his favor that reasonable persons could not differ on the conclusions to be drawn. *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 198 (10th Cir. 1980). In other words, "[t]he standard of review in assessing whether a verdict should have been directed is the same standard applied by the trial court in passing on a motion for directed verdict initially, *i.e.*, whether the evidence is sufficient to create an issue for the jury." *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 385 (10th Cir. 1985). Further, we must view the evidence in the light most favorable to Wren, the non-moving party. *Martin v. Unit Rig & Equipment Co., Inc.*, 715 F.2d 1434, 1438 (10th Cir. 1983).

Spurlock contends that Wren's proof was inadequate to meet even this minimal standard in at least one of three respects. First, she failed to show that her speech was related to matters of public concern, as required by *Connick v. Meyers*, [sic] 461 U.S. 138, 146, 103 S. Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983). Second, even if Wren's activities did touch on matters of public concern, she failed to show that her rights outweigh the state's legitimate interest in promoting efficiency of service under *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). And, third, Wren failed to show that Spurlock's detrimental treatment was motivated by her First Amendment activities.

Under *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the

plaintiff in a retaliation case such as this must show that (1) the speech was constitutionally protected, i.e., the speech related to matters of public concern *and* the speaker's rights outweighed the state's right to control its employees, and (2) the speech was a substantial or the motivating factor in the state's detrimental action. *Id. at 287, 97 S.Ct. 576; accord Saye v. St. Vrain School District RE-1J*, 785 F.2d 862, 865-66 (10th Cir. 1986); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986); *Knapp v. Whitaker*, 757 F.2d 827, 845 (7th Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 36, 88 L.Ed.2d 29 (1985).

The first element, including both the public concern and balancing issues, raises a question of law. *Connick*, 461 U.S. at 148 n. 7, 150 n. 10, 103 S.Ct. at 1690 n. 7, 1692 n. 10; *Saye*, 785 F.2d at 865; *Ferrara*, 781 F.2d at 1515; *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 954 (8th Cir. 1985); *Knapp*, 757 F.2d at 839; *Anderson v. Central Point School District*, 746 F.2d 505, 507 (9th Cir. 1984); *Czurlanis v. Albanese*, 721 F.2d 98, 102-07 (3d Cir. 1983); *Bickel v. Burkhart*, 632 F.2d 1251, 1256 (5th Cir. 1980); *cf. Brasslett v. Cota*, 761 F.2d 827, 840 (1st Cir. 1985) (acknowledging the need for independent review by appellate court of mixed question of law and fact). *But see McGee v. South Pemiscot School District R-V*, 712 F.2d 339, 342 (8th Cir. 1983) (question of whether employee's action created disharmony negating constitutional protection is for the jury). The second element of the plaintiff's case — whether the state's action was motivated by Wren's conduct — raises a question of fact for the jury. *See Knapp*, 757 F.2d at 845.

Here the trial court correctly ruled as a matter of law that Wren's First Amendment activities involved topics of public concern. Bearing in mind that Supreme Court's admonition that "public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record," *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690, we agree with the trial court's disposition. The content of the WEA letter in this case included several complaints about which the community would be understandably concerned, e.g., high faculty turnover and

sexual harassment of students and teachers.[1] In addition, these allegations were presented in the form of a letter from the majority of the school's faculty members calling for an investigation.[2] Its context was a small community in which the school was the hub of activity. Spurlock was not entitled to a directed verdict on this issue.

The trial judge also correctly denied Spurlock's motion for directed verdict on the issue of the balance between the state's interest in efficient service and Wren's right to express her views. Although the trial court erred in leaving that balance to the jury, rather than ruling on it as a matter of law, we are satisfied that the jury implicitly reached the correct result. Thus the error does not require reversal. *See Roberts*, 773 F.2d at 955 & n. 4; *cf. Loya v. Desert Sands Unified School District*, 721 F.2d 279, 281-82 (9th Cir. 1983) (new trial required when jury incorrectly instructed that it must decide balancing question and appellate court disagreed with its conclusion).

Under the *Pickering* test, Wren's First Amendment rights are protected, "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Childers*, 676 F.2d at 1341; *accord National Gay*

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[1]We recognize that it is not always enough that the subject matter of a communication be one in which there *might* be general interest, *Wilson v. City of Littleton, Colorado*, 732 F.2d 765, 768 (10th Cir. 1984) (quoting *Connick*, 461 U.S. at 148 n. 8, 103 S.Ct. at 1691 n. 8), but that what is *actually said* on the topic is the crux of the public concern content inquiry. Here a majority of the teachers, including Wren, made numerous accusations about a principal whose conduct had been questioned previously. Pl. Ex. 450 (letter from Spurlock to school board describing earlier conflicts). Thus the content of the speech points toward a finding of public concern.

[2]This mode of public presentation, among other things, distinguishes this case from *Sipes v. United States*, 744 F.2d 1418, 1423 (10th Cir. 1984), in which we upheld the discharge of an Air Force base worker who had merely complained privately to his superior about inconsistent application of the rules to him. *See also Wilson*, 732 F.2d at 769 (upholding discharge of police officer who refused to remove shroud from badge because of personal grief).

Task Force v. Board of Education, 729 F.2d 1270, 1274 (10th Cir. 1984), *aff'd*, —— U.S. ——, 105 S.Ct. 1858, 84 L.Ed.2d 776 (1985). Here it is undisputed that Spurlock recommended Wren for contract renewal after her first grievance and that the school board refused to accept his later recommendation that she be terminated, which followed the WEA letter and his resulting reprimand. It is reasonable to infer from these actions that the school authorities were satisfied with Wren's teaching, despite Spurlock's stated opinion that she should resign. The superintendent testified that the problem with Wren was not her classroom performance. And, to this day, the school board has not terminated Wren formally. In view of this evidence of Wren's continuing competence, the *Pickering* balance tips in her favor. Her speech therefore was constitutionally protected as a matter of law and should have been so designated by the trial judge.

Spurlock's third ground for a directed verdict — that Wren failed to produce enough evidence to reach the jury on the issue of his motivation — also must fail. In her case-in-chief, Wren presented a wealth of evidence from which a reasonable jury could infer that her conduct was a substantial factor or the motivating factor in Spurlock's later actions toward her. She was suspended by the superintendent, who traveled to Baggs on Spurlock's request, the day after the district teachers' association voted to seek the WEA investigation. Her termination was sought for the first time approximately two months after Spurlock was reprimanded as a result of the WEA investigation. Her written and oral reprimands had increased in number after the WEA letter, and she testified that Spurlock frequently referred to the WEA investigation. In view of this evidence, a directed verdict in Spurlock's favor on the issue of retaliatory motive would have been inappropriate. Rather, the jury's finding that such motive existed is reasonable.

III.

Spurlock contends that the trial court committed reversible error in allowing a clinical psychologist to repeat

another doctor's statement characterizing Spurlock as a "sociopath." Wren argues that Spurlock waived any right to appeal on this issue.

Spurlock called the witness, Dr. Jacques Herter, to testify about his evaluation of Wren's mental state. Herter had concluded that Wren was capable of returning to work. Herter testified on direct examination that, in the course of his evaluation, he had spoken with Dr. Arthur Merrell, Wren's treating psychiatrist. On cross-examination, Wren's counsel asked Herter more about the conversation:

> "Q. Using those notes I would like you to, as best you can, filling in the verbs between the notes, tell the jury what Dr. Merrell told you when you consulted with him about Mrs. Wren.
>
> A. Start from the top?
>
> Q. Yes. Just read it through as though you were reporting the conversation to us but you had the benefit of having the notes.
>
> A. Okay. The first thing we talk about was whether or not she was an obsessive compulsive individual. And both of us agreed. At this stage don't know who said it first but we agreed on that, she was an obsessive compulsive, plotter, driving, hard working.
>
> He said it was a tragedy that this had taken place for her because she was such a hard working individual with a high value system. He stated that she was real tense, were his words.
>
> He stated with the right supervisor she would be great. And although it's not in my notes, he made reference to the fact the right supervisor that she would just work herself to death, that anything could be gotten out of her.
>
> Q. Okay.

A. I asked him if I was reading her well. And he said yes. And then I asked him if she were a paranoid personality in that was she being over suspicious, manufacturing things. And he said no.

MR. ORR [Spurlock's counsel]: Your Honor, I would object at this time. I would anticipate he is about to relate part of this conversation which is irrelevant to the question of cross examining this witness and is hearsay in that respect.

MR. HACKER [Wren's counsel]: Your Honor, I'm offering this, I'm going to go through the things he relied on and I think under expert opinions he talked about part of the conversation. I ought to be able to put in from his notes what he took from Dr. Merrell.

MR. ORR: What is coming comes from Dr. Merrell.

THE COURT: I'm sorry you can't object to part of it and not object to the rest. The jury, however, is instructed that this is hearsay. It's received, though, not for the truth of the matter but for the fact that this is what Dr. Merrell told Dr. Herter and thereby, formed a basis for the opinions that Dr. Herter has expressed.

It is relevant insofar as it goes to Dr. Herter's opinions. For that purpose, you can regard it as having been said or not having been said, whatever you choose to believe.

MR. ORR: For the record I would include, I would state it is irrelevant to any diagnosis or opinion Dr. Herter has as to Mrs. Wren and hearsay.

THE COURT: Well, as I say, I feel you've waived your hearsay objection both on direct and also on the preceding portion of this conversation.

Q: (BY MR. HACKER) Doctor, do you remember where we left off or where you left off? Continue to recount the conversation as you can recall it, based on your notes.

A. I asked him if I was reading it well. By that I meant if I was reading her well based on my test results and observations. He said I was. Then I asked him if he felt that she was being paranoid. And that's used loosely by psychologists and psychiatrists in talking to one another, in that was she someone just fabricating a lot of things and he said no, he didn't feel that she was paranoid.

Then he commented offhand, the next thing in the notes here is that Spurlock's probably a sociopath. As I mentioned in the deposition with Mr. Hacker, again because of the nature of our work and profession we banty [sic] around a lot of terms that if we had to be held to the exact definition of those terms, we could get in a little bit of trouble.

Because here he's calling Spurlock a sociopath and I don't know Mr. Spurlock. But true sociopaths are in jail, people with no anxiety, no conscience, no guilt, no morality, capable of awesome deeds. But he's calling him a sociopath here.

The next thing I asked was well, how severe do you feel her depression is and his comment was that it was moderate.

THE COURT: Ladies and Gentlemen of the Jury, the comment with respect to Mr. Spurlock does, it turns out, become irrelevant to the opinion of Dr. Herter with regard to Mrs. Wren. You're instructed to disregard it."

R. XI, 52-56.

We disagree with Wren's contention that Spurlock's counsel failed to object adequately to this testimony, thereby waiving further appeal. Defense counsel specifically asserted that the testimony would be hearsay and irrelevant as material on which Herter relied for his diagnosis of Wren. The trial court characterized the hearsay objection as waived and admitted the testimony after cautioning the jury that it was relevant only "insofar as it

goes to Dr. Herter's opinions." This exchange adequately preserved the relevancy objection for appeal. *See Markel Service Inc. v. National Farm Lines*, 426 F.2d 1123, 1128 (10th Cir. 1970) (overruled objection protects the record on the ground specified). No further objection was necessary once the trial judge conceded that the "sociopath" comment was irrelevant.

The decision to admit or exclude evidence on relevancy grounds is within the sound discretion of the trial court and will be upheld absent clear abuse. *K-B Trucking Co. v. Riss International Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985). Further, unless error in the admission or exclusion of evidence prejudiced Spurlock's substantial rights, we will not set aside the jury's verdict. *Motive Parts Warehouse*, 774 F.2d at 396.

We see no cause for reversal in this case. Immediately after the "sociopath" comment the trial court instructed the jury to disregard it, and, at both the outset and conclusion of the trial, the trial judge instructed the jury to disregard any evidence the court rejected. In addition, Herter clearly intended for the jury to understand that the term was not used in a scientifically exact or diagnostic sense. Indeed, he emphasized that he did not even know Spurlock. In view of these actions and qualifications on the "sociopath" comment, we find that there was no prejudicial error.

IV.

Spurlock next contends that the trial court erred by submitting Special Interrogatory No. 4 to the jury, because it was compound and misleading. The interrogatory asked, "Did the Defendant Nyles Spurlock take the actions complained of by the Plaintiff with the malicious intention to deprive the Plaintiff of her Constitutional rights or cause other injury to the Plaintiff?" R. II, 291. Spurlock argues that the jury could thus have awarded damages to Wren for injuries other than those related to her exercise of First Amendment rights. Spurlock failed to object to the interrogatory at trial; thus the interrogatory is reviewable only if it is "plain error."

Although we will review "plain and significant" errors in jury instructions not properly objected to at trial, *Fox v. Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir. 1978), this power is used sparingly. *Lusby v. T.G. & Y Stores, Inc.*, 796 F.2d 1307, at 1311 (10th Cir. 1986) (citing *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 1047, 84 L.Ed.2d 1 (1985)); *Pridgin v. Wilkinson*, 296 F.2d 74, 76 (10th Cir. 1961). We do not employ it unless the error "may well have been a generating factor which culminated in a verdict not warranted under the law," *Pridgin*, 296 F.2d at 76, or when the record demonstrates on its face that a miscarriage of justice may occur. *Fox*, 575 F.2d at 786 (quoting 5A *Moore's Federal Practice*, ¶ 51.04). And, finally, "we must view the instruction error in the context of the entire record." *Lusby*, at 1312 (citing *Young*, 105 S.Ct. at 1047).

We do not think this is an appropriate case for such extraordinary review. We have refused to review much more obvious ambiguity in special jury instructions when counsel failed to object before the jury was dismissed. *See Bell v. Mickelsen*, 710 F.2d 611, 616 (10th Cir. 1983). And we note that the jury in this case repeatedly received accurate information on the nature of the case and on the necessity for finding a violation of Wren's constitutional rights before awarding damages.

V.

Spurlock also challenges six of the trial court's jury instructions, the first of which we dealt with in our discussion of the *Pickering* balance in Part II. Instruction No. 12 incorrectly placed the *Pickering* balance before the jury, but it did not result in reversible error because we agree with the jury's implicit conclusion on that legal issue.

Spurlock next argues that Instructions 14, 15, and 16 were unsupported by the evidence. Instruction No. 14 stated that a school administrator could not punish a teacher for "holding ideas or philosophies contrary to those held" by the administrator. R. II, 309. Instruction No. 15 stated that a teacher could not be "discharged for using a particular teaching method or technique relevant to the proper

teaching of the subject matter involved unless the school district has established that the teacher was put on notice either by regulation or otherwise before adverse action was taken." R. II, 310. Instruction No. 16 recited Wyoming law on the rights of continuing contract teachers such as Wren, including the procedure necessary for proper termination. Spurlock specifically argues that No. 16 was prejudicial and confusing because Wren never was terminated formally.

We reject Spurlock's contentions. "Under federal law, an instruction is proper if supported by competent evidence." *Achin v. Begg Tire Center*, 694 F.2d 226, 228 (10th Cir. 1982); *accord Trigg v. City and County of Denver*, 784 F.2d 1058, 1059 (10th Cir. 1986). When presented ample competent evidence from which a jury could infer under Instructions No. 14 and 15 that Spurlock's negative actions were spawned by his disagreement with Wren's personal views and teaching style. [*Sic.*] And the school superintendent admitted that the number of Wren's reprimands increased as she became more outspoken about Spurlock's conduct. With respect to Instruction No. 16, although it is true that Wren never was terminated formally, the specter of termination loomed over her at least three times: after her suspension by the superintendent, and after Spurlock's two recommendations to the school board that she be fired. The procedures the board must have observed if it were to follow through were therefore relevant. In addition, Instruction No. 16 also informed jury members of the proper causes for such termination, which would assist them in evaluating the justification for Spurlock's admitted desire to see Wren resign.

Spurlock also challenges Instruction No. 21, which said:

> "A person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, she is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.
>
> This is true even if the person's condition or disability made her more susceptible to the possibility

> of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.
>
> When preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation."

R. II, 317. We do not agree with Spurlock's argument that this instruction improperly eliminated Wren's burden of showing causality between Spurlock's conduct depriving her of her rights and her injuries. Nothing in Instruction No. 21 contradicts or clouds the directive of Instruction No. 7, which told the jury that Wren must show Spurlock's conduct was the proximate cause of her injuries. Further, Instruction No. 18 defined proximate cause. If anything, Instruction No. 21 strengthened the potentially positive impact on defendant's case of the causality instructions. Like them, it tended to limit the amount of recoverable damages. It ensured that the jury would award only that sum arising from Spurlock's aggravation of whatever preexisting condition or disability may have plagued Wren, not the sum that would compensate her for her total disability.

Spurlock finally challenges Instruction No. 25, which allowed for an award of punitive damages if the jury found by a preponderance of the evidence that his acts were "maliciously or wantonly, or oppressively done." R. II, 321. Spurlock contends that this instruction should have been refused as a matter of law, because the record lacks any probative facts on the issue.

We disagree. Punitive damages are available in § 1983 actions, and evidence of "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness" of such an award. *Smith v. Wade*, 461 U.S. 30, 51, 103 S.Ct. 1625, 1637, 75 L.Ed.2d 632 (1983); *see also Miller v. City of Mission, Kansas*, 705 F.2d 368, 377 (10th Cir.1983) (allowance of

punitive damages within the discretion of the trier of fact). More than enough evidence exists in this record to reach the jury on the punitive damages issue. Spurlock testified that he considered Wren's conduct unprofessional even though he knew she had a right to file a grievance. Even during the adjudication of her first grievance, he thought the simple solution would be Wren's resignation. Wren testified, among other things, that Spurlock said he would be after her job, regardless of the outcome of her first grievance; that he talked about hitting her daughter; that his observations of her teaching increased in number and negative focus after the WEA letter; and that he threatened to sue her and smear her in the newspaper. In light of this testimony, the numerous observation report exhibits, and Spurlock's role in Wren's suspension, it was permissible for the jury to infer that Spurlock acted recklessly or in callous disregard of her rights. If anything, the wording of the instruction favored Spurlock by omitting reference to recklessness, thereby elevating the legal standard. The instruction was proper on the facts of this case.

VI.

Spurlock argues that both the compensatory and punitive awards were excessive.

We note that the determination of damages is for the jury. *Whiteley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir.1983). And, "absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invalidated the trial, the jury's determination of the fact is considered inviolate." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 503 (10th Cir.1984) (quoting *Garrick v. City and County of Denver*, 652 F.2d 969, 971-72 (10th Cir.1981)); *see also Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir.1962).

We are not shocked at the amounts of compensatory and punitive damages awarded to Wren in this case. Although the evidence on her ability to return to work was conflicting, there is sufficient consistent evidence to sustain the jury verdict. *See Whiteley*, 719 F.2d at 1058. Wren's economic

expert testified that the present value of Wren's lifetime earnings from the school district was $636,896. We have already recited some of the evidence justifying the punitive damages instruction, from which the jury could have inferred that Spurlock's conduct was malicious and at least partially responsible for Wren's noneconomic injury.

VII.

Finally, Spurlock argues that he is entitled to set off against the verdict the $125,000 settlement paid by his former codefendants, the school district and school superintendent, because Wren's injury was "indivisible." The trial court ruled against Spurlock's motion for relief from judgment on this issue, reasoning that the claims against Spurlock were divisible from those against the codefendants and that the jury was adequately instructed to award only those damages that Spurlock proximately caused. The trial court therefore declined to determine whether federal or state law controlled contribution in § 1983 actions. Spurlock contends that both would mandate the setoff; Wren argues that Wyoming law controls and would not require setoff.

We also decline in this case to determine whether federal or state law governs contribution in a § 1983 action and what is the precise content of the standard. *Compare Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101, 108-110 (3d Cir. 1981) (federal law determines availability of contribution in federal civil rights actions) *with Johnson v. Rogers*, 621 F.2d 300, 304 n. 6 (8th Cir.1980) (state law controls effect of plaintiff's settlement with one defendant on nonsettling codefendant) *and Gray v. City of Kansas City, Kansas*, 603 F.Supp. 872, 873-76 (D.Kan.1985) (may look to state law to determine whether right to contribution exists). This is not a case for contribution. Rather, we agree with the trial court that Wren's injury and resulting damages were divisible and therefore capable of apportionment by the jury.[3]

---

[3]Thus the first of the two principal elements of a common-law right to contribution is not present: common liability. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 83, 87-88, 101 S.Ct. 1571, 1576, 1578-79, 67 L.Ed.2d 750 (1981); *Dobson v. Camden*, 725 F.2d 1003, 1006 (5th Cir. 1984) (en banc).

The evidence in this case contained numerous instances of allegedly harassing and retaliatory conduct by Spurlock alone, as well as instances when the school district or superintendent had acted on his advice. This therefore is unlike the classic situation in which two defendants struggle for the same gun and succeed in shooting the plaintiff, causing an unquestionably indivisible harm. *See* W. Prosser, *Handbook of the Law of Torts* 314 (4th ed. 1971). Rather, in the circumstances of this case, the harm Wren suffered was one for which there was a "reasonable basis for division" among the defendants. *See Restatement (Second) of Torts* § 881 (1977). "Where such apportionment can be made without injustice to any of the parties, the court may require it to be made." *Id.* at § 433 A comment d (1963).

There was no injustice to Spurlock here. The jury was told immediately that there had been a settlement; the court explained that it did not affect the claims against Spurlock. During closing argument, Spurlock's counsel attempted to separate his client from and emphasize the responsibility of the now-dismissed codefendants. The court explicitly instructed the jury on the necessity of finding *Spurlock's* conduct to be the proximate cause of Wren's injuries.

The harm to Wren, i.e., her mental problems and resulting loss of employment, is not obviously divisible into those discrete portions attributable to Spurlock and those not so attributable. But that difficulty is not Wren's fault.[4] The courts have been liberal in allowing juries to award damages in situations when the uncertainty of apportionment "arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible." W. Prosser at 318-19.

The judgment of the district court is AFFIRMED.

---

[4]It also is notable that no contribution like that sought by Spurlock in the form of a setoff was allowed historically when the tortious conduct was intentional. W. Prosser, *Handbook of the Law of Torts*, 306 (4th ed. 1971).

No. 86-763

IN THE

Supreme Court of the United States

October Term, 1986

W. NYLES SPURLOCK,

Petitioner,

v.

LOIS E. WREN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

LOIS E. WREN, Plaintiff,	)	
vs.	)	NO. C82-0157-B
W. NYLES SPURLOCK, HUGH SIMMONS, CARBON COUNTY SCHOOL DISTRICT NO. 1, Defendants.	)	

ORDER ON MOTIONS

This matter having come on for hearing before the Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, upon Defendant Spurlock's Motion for Judgment Notwithstanding the Verdict, and upon Defendant Spurlock's Motion for Relief from Judgment on Grounds of Satisfaction. Counsel present were Patrick E. Hacker, Esq., for the Plaintiff, and Lawrence G. Orr, Esq., and Lynn Boak Orr, Esq., for Defendant Nyles Spurlock. The Court having reviewed the pleadings, having considered the arguments of counsel, and being otherwise advised in the premises, FINDS and ORDERS as follows:

The Plaintiff entered a settlement agreement with Defendants Simmons, and Carbon County School District Number 1 in an amount of $125,000. The trial in this matter thereafter continued concerning liability as between the Plaintiff and Defendant Spurlock. After all evidence was presented, the jury returned a verdict in favor of the Plaintiff awarding $113,000 in compensatory damages, and $7,500 in punitive damages. In his Motion for Relief from Judgment Defendant Spurlock argues that he is entitled to set off the judgment by the amount of the settlement, and that therefore the judgment should be declared to be satisifed by the Court.

Initially, Defendant Spurlock argues that federal law governs the right to contribution, and thus the effect of a settlement, in the context of a civil damages action brought under 42 U.S.C. § 1983. The governing provision controlling this question is 42 U.S.C. § 1988, which states in part:

> Proceedings in vindication of civil rights.
>
> The jurisdiction in civil... matters conferred on district courts by the provisions of this chapter... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adaptable to the object, or are deficient in the provisions necessary to furnish suitable remedies... the common law, as modified and changed by the constitution and statutes of the state wherein the Court sits having jurisdiction over such civil... cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause...

Title 42 of the United States Code is silent upon the issue of the right and effect of contribution. Federal Courts have divided on the question whether specific State contribution statutes should be applied in civil actions under 42 U.S.C. § 1983, or where such provisions are inconsistent with the Constitution or laws of the United States under 42 U.S.C. § 1988, as that provision was construed in *Robertson v. Wegmann*, 436 U.S. 584, 588-90 (1978); *Glus v. G. C. Murphy Co.*, 629 F2d 248 (3rd Cir., 1980), vacated in part and remanded sub. nom.; *Retail, Wholesale, and Dept. Store Union v. G. C. Murphy Co.*, 451 U.S. 935 (1981); *Denicola v. G. C. Murphy Co.*, 562 F2d 889 (3rd Cir., 1977); *Johnson v. Rogers*, 621 F2d 300 (8th Cir., 1980); *Miller v. Apartment and Homes of New Jersey, Inc.*, 646 F2d 101 (3rd Cir., 1981). The United States Supreme Court ruled that contribution under state law between

unions and employers was inconsistent with Federal law in the context of civil rights actions brought under the Equal Pay Act, and Title VII, but restricted its ruling to that context and refused to speculate whether contribution would be available in civil actions brought under other civil rights provisions. *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981). Thus no clear precedent exists to aid the Court in determination of this question.

However, the Court believes that it is not necessary to determine this issue in order to resolve the question presented in the Defendant's Motion for Relief from Judgment. The movant is not requesting the Court to grant or deny contribution from the opponent to this motion. Furthermore, the provisions of W.S. § 1-1-110, as construed by *Danculovich v. Brown*, 593 P2d 187 (Wyo., 1979) determine the question whether a Plaintiff's recovery should be reduced based on the Plaintiff's negligence where the Defendant has been found to have committeed a wilful or intential tort, and do not answer the question presented as to whether the settlement should offset the judgment recovered by the Plaintiff against Defendant Spurlock. This instead is a question of proximate cause, and of whether or not the claims alleged against the various Defendants in this action are divisible. The jury was instructed to award the Plaintiff only damages proximately caused by Defendant Spurlock's misconduct. The Court believes that the claims asserted are divisible, and that substantial evidence supports the jury's verdict as to proximate cause. Therefore Defendant Spurlock's Motion for Relief from the Judgment should be denied.

The Court also believes that substantial evidence supports the remainder of the jury's verdict. Therefore Defendant Spurlock's Motion for Judgment Notwithstanding the Verdict should be denied. It is hereby

ORDERED that Defendant Spurlock's Motion for Relief from Judgment be, and the same hereby is, denied with prejudice. It is further

ORDERED that Defendant Spurlock's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied with prejudice.

Dated this 30th day of September, 1983.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE

No. 86-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

W. NYLES SPURLOCK,

Petitioner,

v.

LOIS E. WREN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition presents no issue that warrants this Court's consideration, and accordingly should be denied.

COUNTER-STATEMENT OF THE CASE

A somewhat fuller exposition of the facts may be helpful to the Court in evaluating the petition.

A. The Community, the School, and the History of Community Controversy About Spurlock's Performance as Principal.

Petitioner Spurlock was the principal of the public school in Baggs, Wyoming, and Respondent Wren was a

teacher in that school. Baggs is a small town with a population of 600, located in the Snake River Valley; the Valley's total population is only 1,000 (X:179). The school contains within one building all grades from first through 12th. There are 17 teachers in the school. Because Baggs is geographically isolated, and 77 miles from the city where the School Superintendent is located (Rawlins), the principal in Baggs has greater autonomy than would be true of most principals (I Supp:13-14).

In Baggs, the school is "the hub of the community" (X:167, 170, 179). Almost everyone in the community is connected in some way with the school, which is the focus of "community social and political relations" (X:180, 201).

Spurlock came to Baggs as principal in 1973 (XII: 6-7), and his performance as principal was, throughout his tenure, a matter of public controversy. Long before the events that gave rise to this lawsuit, the Board of Trustees had conducted hearings, at the behest of complaining parents, about Spurlock's performance (IX:121; X:31-33, 145-47; PX 450:2).

B. Wren's First Five Years With Spurlock.

Wren began teaching at Spurlock's school in 1974, a year after Spurlock arrived (VI:361). Spurlock repeatedly recommended renewal of Wren's teaching contract, with the result that Wren acquired tenure (IV:74-78), and as Spurlock testified at trial, there were "no major problems" between them until 1979 (IV:90-91; XII:240). Wren was considered a good teacher by both the School Superintendent and the Board of Trustees (IX:42, 90, 134).

On October 24, 1979, Wren filed a grievance alleging that Spurlock was enforcing "rules" against her (some of which were not in writing and that she had not known existed) that were not enforced against other teachers (PX 45:1, 18; V:365).

The Board of Trustees held a hearing on the grievance on December 5, 1979, at which several teachers testified that Spurlock discriminated as between teachers in his enforcement of the rules (IV:163-64; V:245, 313-315). The Board found that both Spurlock and Wren were at fault, and resolved the grievance by ordering Spurlock not to discriminate in enforcing rules and ordering Wren to obey the rules.

Spurlock's next evaluation of Wren following resolution of the grievance, dated February 6, 1980, gave Wren high marks in every category (PX 81); the evaluation was, as Spurlock testified, "one I would like to receive" (XII:119).

C. The WEA Controversy.

Spurlock's favorable opinion of Wren ended abruptly, however, when Wren joined with other teachers to request an investigation by the Wyoming Education Association (WEA) of practices at the school. On April 18, 1980, a majority of the school's faculty—nine teachers, including Wren—addressed a letter to the WEA listing 35 categories of "concerns" and requesting "an investigation by the W.E.A. into the administration and administration related problems" (PX 305).

Parents, students and other community members had had input in the preparation of the letter (V:276, 296, 328, 394). While some of the "concerns" listed in the letter involved Spurlock's treatment of teachers, many involved Spurlock's treatment of students, his behavior toward parents, his misuse of school equipment, and the quality of the educational process (PX 305). The uniform testimony, including that of the School Superintendent and other school officials, was that all the matters listed in the letter were of great public interest and controversy in the community (IX:67-68, 107-108; X:79, 145, 222; XI:75; II Supp. 29).

Upon receipt of the letter, the WEA undertook an extensive investigation, interviewing teachers, parents, and students (V:328). On the basis of its investigation, the WEA wrote to the School District that it had determined there was "a severe problem" respecting Spurlock's administration of the school (PX 320:1), which it wished to discuss with the Board of Trustees (*id.* at 5). The letter recounted *inter alia* the following complaints about Spurlock that the WEA had received in the course of its investigation (*id.* at 2-4):

> 1. A female student was forced to submit to a "strip search" at the order of the principal. Two female teacher employees were ordered by the principal to conduct the "strip search" and the search was conducted. No contraband or drugs were recovered.
>
> 2. A female student was subjected to a one hour questioning session regarding family life, past and present boyfriends, sexual relations that may have occurred, and other private matters. The original reason for the conference was to discuss mid-term graduation.
>
> 3. A female teacher has been asked if she was "a virgin"; with whom she had slept; and whether she was sexually frustrated.
>
> 4. A female student was asked if she had had sexual relations with her father; told that she should have sex with a married man; and was offered the opportunity to make a doctor's appointment to obtain birth control pills.
>
> 5. Female students have had private counseling sessions with [Spurlock] with regard to their social and sexual activity.
>
> * * * *
>
> 7. Blood relatives of [Spurlock], who do not possess the necessary credentials, have been used as substitute teachers.

8. A teacher was publicly embarrassed by [Spurlock] for the reason that the teacher voted against [Spurlock's] position while serving on a student grievance committee.

* * * *

11. Use of school van for personal purposes on out of town trip.

12. Discriminatory and inconsistent enforcement of faculty rules.

13. Discriminatory and inconsistent enforcement of pupil rules.

* * * *

15. Objected to the formation of a PTA.

* * * *

17. Retaliation against students for parental disagreement with administrative decisions.

* * * *

19. Failure to grant tenure to 90% of the teachers employed by the school.

20. Contradictory policies on grading.

* * * *

29. The changing of a student's grade without consultation with the teacher.

* * * *

31. Excessive mood swings from exhiliaration to depression.

32. Leaving school grounds during school hours without cause.

33. Taping of conversations

34. Expulsion and denial of graduation to student with 25 days left prior to graduating.

The Board of Trustees decided to meet with the WEA representatives (IX:62-63). Spurlock was outraged. He wrote to the Board President "object[ing] to the meet-

ing" (PX 450:1), asserting that "the Board is nurturing small town politics" (*id.* at 3). He argued:

> I am dumbfounded. I can't believe the board is going to listen to this W.E.A. so-called investigation. . . .
>
> . . . Gathered along with the teachers [at the WEA's investigative hearing] were the "town drunks, pushers" and parents of the students who had gotten into trouble at school. . . .
>
> * * * *
>
> The W.E.A. and this group are doing nothing but attempting to keep the school upset, the town upset, and harassing the school district. . . .
>
> With all due respect, I am not sure the Board understands the small town politics aspects of Baggs.
>
> [The letter here recounted, disapprovingly, prior instances in which the Board had conducted hearings at the request of parents complaining about Spurlock]
>
> * * * *
>
> We are going to hear what a group of teachers, some mad parents, students, W.E.A., and anyone else who is against Spurlock. They are together. . . . Again the Board is nurturing small town politics. Just because they number, don't make them right.
>
> * * * *
>
> In summary, I feel we as a team, the Board and its Administrator, are letting outside groups come in, yell wolf trying to destroy ourselves. [PX 450: 1-4.]

In the course of the letter, Spurlock noted that the controversy surrounding his performance had been the subject of extensive newspaper coverage (*id.* at 3).

After meeting with the WEA, the Board decided to hire its own investigator to look into the allegations (II Supp:63). In December, 1980, on the basis of the investi-

gator's report, the Board voted to reprimand Spurlock on three counts: improper strip search of a female student, talking about students' "private lives," and illegal or unauthorized use of the school bus (IV:122; IX:226-227; PX 289-A).[1]

D. Spurlock's Harassment of and Retaliation Against Wren Following the WEA Letter.

Spurlock perceived Wren to have been the catalyst for the WEA investigation (PX 450:1).[2] Soon after the letter to the WEA was sent, Spurlock commenced a reign of terror against the signers, and most particularly against Wren. On the day he learned of the letter, Spurlock called Wren out of her classroom; he was "very angry, almost furious" (VI:13-14). A few days later, Spurlock referred to the WEA letter and told Wren he was going to "watch every move" she made (VI:63). In the ensuing days, weeks, and months, Spurlock engaged in the following forms of harassment of Wren:

1. Spurlock began visiting Wren's classes on a regular basis—sometimes several classes on a single day—standing and watching without comment. The frequency of these visits to a single teacher's classroom was unprecedented, wholly unlike the periodic "observations" done for the quarterly evaluations; students testified at trial that

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[1] The trial court granted a motion *in limine* filed by defendants prior to commencement of the trial, precluding the submission of factual evidence supporting the Board's findings and the correctness of the other complaints made by the teachers to the WEA, and precluding as well introduction of the fact that Spurlock ultimately was dismissed by the Board of Trustees for misconduct (IV:4-14).

[2] Spurlock was correct to this extent: although there were nine teachers, as well as parents and others, who wished to bring the matters recited in the WEA letter to the Board's attention—the Board being 77 miles away—it was Wren who suggested that the most effective vehicle would be a letter to the WEA requesting an investigation (V:380).

the visits unnerved them (VI:14; XII:250; XIII:12-13; PX 176).

2. Spurlock began imposing wholly arbitrary and eccentric rules on Wren—rules that never had existed before and that were not applied to other teachers—and prepared written "reprimands" (with copies to the Superintendent) alleging that Wren was repeatedly violating these rules; the allegations were usually false, but even when not, the "violation" was not something that occasioned a reprimand when committed by other teachers. For example, Wren alone was not allowed to send students from the classroom to borrow equipment, or to get books from the library, or to perform other school-related functions, and Spurlock watched Wren's classroom to catch her in "violations" of this newly-created rule. Numerous teachers and students testified to a variety of "rules" that were applied to and enforced against Wren but not against others. (IV:160-61, 164, 175-77; V:242-43, 247, 264-65, 273-74, 385-86; VI:6-7, 11-12, 75-81; VII:13, 87; XI:79-80, 86; XII:191-92, 217; XIII:9, 34-35; PX-176.)

3. Spurlock's first formal evaluation of Wren after the WEA letter came on May 6, 1980 (PX 87). In contrast to the prior evaluation, which had been glowing (*see* p. 3, *supra*), this one was extremely negative (VI: 83-85). Among Spurlock's comments on the evaluation was that Wren was "splitting the faculty" (VI:63-64), a reference to the WEA letter (XIII:125, 192-95).

4. On May 14, 1980, Spurlock called the Superintendent and asked that he come to Baggs because Wren was flagrantly disobeying rules. The Superintendent journeyed to Baggs that day, and conducted a lengthy meeting with Spurlock and Wren. Repeatedly during the meeting, Spurlock stated: "If Mrs. Wren is going to disagree with me . . . I am going to apply the rules strictly to her" (IX:71). At the conclusion of the meeting, based on Spurlock's recital of supposed rule violations by Wren

(all of which were false or committed by other teachers with impunity, VI:17-29, 31-32)), the Superintendent told Wren that she was suspended with pay (II Supp. 23). Later that day, the Superintendent rescinded the suspension; he had talked to the School District's attorney and concluded that he had "goofed" (II Supp. 23; IX:22-23, 79-82).

5. On June 3, 1980—the last day of the school year—Spurlock summoned Wren to his office and lectured her for two hours. He told her that he had retained a lawyer and was planning to sue her for slander because of the allegations in the WEA letter. He told her that "if" she returned for the following school year he was going to eliminate some of her classes, and would not order supplies for her. He said that she would be alone amongst the faculty. He falsely accused her of continuing to violate the rules (VI:64-67).

6. The campaign of harassment by Spurlock continued unabated through the following school year (1980-81); indeed, following the Board of Trustees' reprimand of Spurlock in December, 1980, the written "reprimands" of Wren accelerated (PX-176; VI:75-82).

7. Only four of the nine signers of the WEA letter had returned to teach in the 1980-81 school year. When it came time for the Board to consider contracts for the following (1981-82) school year, Spurlock recommended that all four of the remaining signers (including Wren) not be renewed (IV:128-30, 181-82). The Board of Trustees rejected Spurlock's recommendation as to all four, and offered each a new contract, on the advice of the Board's attorney that there were not grounds justifying non-renewal (II Supp. 40-42; IX:128).

E. The Effect of Spurlock's Harassment Upon Wren.

Spurlock's daily harassment of Wren—which continued for more than a year—drove Wren into clinical depression, and ultimately rendered her unable to continue her teaching career. Wren experienced insomnia,

weight loss, colitis, and uncontrollable crying spells (III: 104-105). The unanimous consensus of five psychiatrists is that by the end of the 1980-81 school year she was clinically depressed (VIII:190; XI:29-30, 144-45; III Supp. 21, 27).

After the Board of Trustees had voted despite Spurlock's recommendation to renew Wren's contract for the 1981-82 school year, Wren requested a one-year leave of absence, on the ground that she was unable physically or mentally to continue teaching; the Board granted an unpaid leave of absence (VI:86-88). Wren likewise did not return for the 1982-83 school year, advising the Board that she still did not feel well enough to teach (VI:94). At the time of trial, Wren was still eligible to return to her teaching position, but in a mid-trial settlement reached between Wren and the School District, Wren agreed *inter alia* to relinquish her employment status in consideration for a monetary payment from the School District.

ARGUMENT

We address petitioner's four questions presented *seriatim*, and show that none warrants this Court's consideration.

1. *The "Pickering" Balance.*

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court announced two discrete principles that are applicable when a public employee challenges an adverse employment action visited in response to the exercise of First Amendment rights. The first principle is that such an adverse employment action is unconstitutional only if the content of the First Amendment exercise involves "a matter of public concern." *Id.* at 143-49. In this case, the district court and court of appeals both concluded that Wren's First Amendment activities involved matters of public concern (A 5-6). That conclusion is plainly correct on this record (*supra*, pp. 3-7), and Spurlock does not ask that this Court review that determination.

Rather, Spurlock seeks review respecting the second principle announced in *Connick*, a principle derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968): that even where an adverse employment action is motivated by First Amendment activities involving matters of public concern, the constitutionality of that interference depends upon balancing the public interest in receiving the teacher's communication against the government's interest "in the effective and efficient fulfillment of its responsibilities to the public," *i.e.*, its interest, *qua* employer, in avoiding "disruption of the office and the destruction of working relationships" (*Connick*, 461 U.S. 149-54). The court below struck this balance in favor of Wren, finding dispositive the Board of Trustees' decision to renew Wren's employment following her exercise of First Amendment rights (A 6-7). Spurlock asks this Court to grant certiorari and strike the balance anew.

Spurlock simply misunderstands the *Pickering* balancing test. Assuming *arguendo* that Wren's activities *could* have been seen as creating such a disruption of "harmony in the workplace and close working relationships" (Pet. 13) as to have *empowered* the Board of Trustees to dismiss Wren consistent with the *Pickering* balance,[3] the dispositive fact is that the Board, whose responsibility it was to make that judgment, renewed Wren's employment in each of the two years following those activities.[4]

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[3] Although the question was not presented in this case (because the Board of Trustees voted *not* to dismiss Wren), we believe the *Pickering* balance would not have permitted the dismissal of Wren on the facts of this case. For whatever disharmony may have eventuated from Wren's activities, that surely was outweighed by the public interest in learning of the serious defalcations by Spurlock that Wren and her colleagues brought to light. *See*, *Connick*, 461 U.S. at 152, 154.

[4] Indeed, even Spurlock did not seek Wren's removal in the first of those years. And while he did seek Wren's removal in the second year after the WEA letter had ripened into a reprimand of Spurlock by the Board of Trustees for misconduct, the Board

The responsible education officials in the community having concluded that Wren's actions did *not* preclude her continued employment, there is no room for a federal court to strike the balance differently. *See, Connick*, 461 U.S. at 151-52. And the government interest to be balanced under *Pickering* ends with that determination. There is surely no legitimate government interest served by a superior's engaging in a campaign of day-to-day harassment of a subordinate as punishment for the latter's exercise of First Amendment rights. Spurlock offers nothing to show how, by driving Wren to physical and mental ruin, he served "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". (*Pickering*, 391 U.S. at 568).

2. *Was There "Constitutional Infringement"?*

Spurlock's second question presented asks whether "retaliation for exercise of First Amendment rights . . . rise[s] to a level of constitutional infringement where it consists of . . . harassment, and does not involve suspension, termination, demotion, transfer, reduction of benefits, or other such significant alteration of employment status." This question was not raised in the court below, nor was it addressed or decided by that court.

Even if the question *had* been raised in the court below, it would not warrant this Court's attention, for two reasons:

First, the question is not presented on the facts of this case. This is not a case where the sole injury was receipt of verbal abuse. Rather, this is a case where the defendant's behavior drove the victim to a state of clinical depression, and caused the victim to lose at least two years' employment because of physical and mental in-

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rejected that suggestion, concluding that there was no justification for Wren's removal (see p. 9, *supra*).

capacity to teach. In legal terms, this was a constructive discharge—plainly a "significant alteration of employment status."

Second, the question would not warrant this Court's attention even were it presented by the facts (*i.e.*, even if the lone injury inflicted was mental suffering). This Court has held that "mental and emotional distress" caused by constitutional violations is "compensable under § 1983." *Carey v. Piphus*, 435 U.S. 247, 264 (1978). Plainly, the intentional infliction of such injury, by the means employed here (*supra*, pp. 7-9), in retaliation for the exercise of constitutional rights, is actionable under § 1983. Indeed, given the origin of § 1983 as an effort to respond to the campaigns of terror conducted by the Ku Klux Klan, *Wilson v. Garcia*, 471 U.S. 261 (1985), it would be startling indeed—and welcome news to the Klan—if harassment such as occurred here did not "rise to the level of a constitutional infringement."

3. *Were the Instructions Taken As A Whole "Plainly Erroneous?"*

Spurlock's third question presented is whether the trial court's instructions, taken as a whole, were "plainly erroneous." As this formulation suggests, and as Spurlock acknowledges in the body of the petition (at 15), many of the instructions about which he now complains were "not objected to" in the trial court. Indeed, many were not objected to in the court of appeals, either. (The only instructions and interrogatories challenged in the court of appeals are those discussed in the court of appeals' opinion (A 11-15).[5] Spurlock thus would elevate

[5] Spurlock in *this* Court complains (Pet. 21-22) about the legal correctness of Instructions 14 and 15 (grouped into category I in the petition). But in the lower courts, Spurlock did not challenge those instruction as legally erroneous; rather he challenged those instructions *only* on the ground that the record did not contain evidence warranting the giving of those instructions, and that is

the plain error rule to a hitherto unprecedented level: he would have this Court grant certiorari to determine whether plain error was committed by the giving of instructions that were neither objected to in the trial court nor challenged as plain error in the court of appeals.

Petitioner does not seek review in this Court of any particular instruction or interrogatory, but rather of the impact of all the instructions and interrogatories "taken as a whole" (Pet. 15). That question does not warrant this Court's attention for at least the following reasons: it was not presented to the court of appeals; it was not presented as an objection in the district court and thus could be cognizable only if plain error; the court below correctly stated the principles that govern the application of the plain error rule (A 12), and this case thus presents no question of generic importance as to the meaning of that rule; any determination that the instructions here taken as a whole were plainly erroneous would be significant only as to this case and would have no precedential effect whatsoever; and, for the reason stated by the court below in rejecting the one "plain error" contention made to it, the plain error rule is inapplicable here because, reading the entirety of the instructions and interrogatories (which are selectively and inaccurately characterized in the petition) "the jury in this case repeatedly received accurate information on the nature of the case and on the necessity for finding a violation of Wren's constitutional rights before awarding damages" (A 12). What is more, there is no error at all, let alone plain error, in the instructions, either individually or taken as a whole.

The trial of this case consumed ten days, and the district court conducted an extensive dialogue with counsel

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the only challenge to those instructions that the court below considered (A 12-13).

respecting its proposed instructions and interrogatories before charging the jury. Spurlock was represented throughout those proceedings by able, experienced counsel. In these circumstances, Spurlock's hitherto unsurfaced quibbles about the instructions and interrogatories hardly warrant a first airing in this Court.

4. *The Set-off Issue.*

Spurlock's fourth question presented is whether there is "indivisible injury *as a matter of federal law*" (emphasis added) such that Spurlock is entitled to a set-off of the amount received by Wren from the two settling defendants. For two reasons, that question does not warrant this Court's attention.

First, contrary to Spurlock's supposition, the question he proffers is not one of federal law, for Wyoming law controls the availability of set-off in this case. As this Court has explained, 42 U.S.C. § 1988, which governs § 1983 actions such as the instant case,

> recognizes that in certain areas "federal law is unsuited or insufficient 'to furnish suitable remedies' "; federal law simply does not "cover every issue that may arise in the context of a federal civil rights action." . . . When federal law is thus "deficient," § 1988 instructs us to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," as long as these are "not inconsistent with the Constitution and laws of the United States."

Robertson v. Wegmann, 436 U.S. 584, 588 (1978) (citations omitted). *See also, Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). There is no federal law of contribution, *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), and the same is true as to set-off. Thus, the *Robertson* principle dictates that the availability of set-off is governed by Wyoming law. *Accord: Johnson v. Rogers*, 621 F.2d 300, 304 & n.6 (8th Cir. 1980). Cer-

tiorari is not warranted to resolve a question of Wyoming law.[6]

Second, both the district court and court of appeals found *as fact* that the injury suffered by Wren at the hands of Spurlock was distinct from the injury she suffered at the hands of the other two defendants (A 16-17). Even if the question of set-off were governed by federal law, there is no occasion for this Court to address a factual question that can have no precedential significance, the more so as the lower courts agreed on the resolution of that factual question.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[6] The court below found it unnecessary to decide whether federal or Wyoming law governs the set-off issue (A 16), in light of its factual determination discussed next in text.

No. 86-763

IN THE

Supreme Court of the United States

October Term, 1986

W. NYLES SPURLOCK,

Petitioner,

v.

LOIS E. WREN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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January 20, 1987

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PETITIONER'S REPLY MEMORANDUM

A. RESPONDENT FAILS TO ADDRESS THE DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

Respondent, Lois E. Wren, in her Brief in Opposition focuses precisely on the resulting erosion of this Court's prior holdings in *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Connick v. Myers,* 461 U.S. 138 (1983), that will arise if the dangerous precedent established by the Tenth Circuit is left unaddressed. Wren argues that the action of the school board in deciding to renew Wren's contract (while reprimanding her) constituted the "dispositive fact" in resolving the *Pickering* balancing test; thus, "there is no room for a federal court to strike the balance

differently . . . (a)nd the government interest to be balanced under *Pickering* ends with that determination" (Brief in Op., pp. 11-12). Wren's position highlights the harm that can result from the Tenth Circuit's misapplication of the *Pickering* balance in direct conflict with this Court's decisions in *Connick* and *Pickering*.

If the Tenth Circuit and Wren are to believed, the mere fact that a public employee is retained precludes *any* consideration of the government's interest in applying the *Pickering* balance. However, neither this Court, nor any other circuit court, has taken such a position. All other federal appellate courts since *Connick* have recognized that *full* consideration must be given to the government's interest in determining whether the employee was engaged in protected activity. Such consideration involves matters pertaining to the nature of the disruption caused by the employee's speech and its effect on the working environment – none of which is addressed or resolved by simply noting the fact that the employee continued to be employed after speaking on a matter of public concern.

It is understandable that given the utter failure of the Tenth Circuit to consider any of those factors this Court deemed important in applying the *Pickering* balance, Wren weakly attempts to rationalize this failure by asserting that no consideration of the *Connick* factors was required when Wren was retained. However, this simply reflects a lack of understanding of the *Pickering-Connick* principles applicable to determining whether the speech is constitutionally protected. Consideration of both the interests of the employee *and* the interests of the government must be made.

The nature of Wren's opposition makes clear how the decision of the Tenth Circuit, if left uncorrected, will establish a dangerous precedent that will serve to undermine the guidelines mandated by this Court to

resolve an issue of such critical importance to all public administrators. The need for plenary review is without question.

B. THE REMAINING QUESTIONS PRESENT REVIEWABLE ISSUES FOR THIS COURT.

The question of whether Spurlock's conduct toward Wren rose to a level of constitutional infringement was presented to the Tenth Circuit, notwithstanding Wren's assertion in her opposing brief to the contrary (Brief in Op., p. 12). The Tenth Circuit held that the evidence of Spurlock's retaliatory conduct was sufficient and cited the evidence it believed pertained to this conclusion. This conclusion required determination of the degree of conduct required before constitutional infringement is reached in First Amendment retaliation cases. The court below decided that the continuation of harrassment that pre-existed the exercise of Wren's speech constituted infringement.

This Court has not previously set forth guidelines for lower courts to follow in determining the scope of conduct required to constitute First Amendment infringement. The court below required no evidence that Spurlock's alleged retaliatory conduct directly affected Wren's employment in a material way. Thus, the Tenth Circuit allowed for the constitutionalization of a pre-existing and long-standing employee grievance, something *Connick* had warned against.

In addition, contrary to Wren's claim in her response (Brief in Op., pp. 13-14), Petitioner is not raising new matters with respect to the instructions. Wren fails to understand that Petitioner set forth in his petition the entire instructions given by the trial court to establish a context for demonstrating that the specific instructions contested in the court below were plainly erroneous in light of all the instructions, and were the generating factor which culminated in a verdict not warranted under the law. *See Pridgin v. Wilkinson*, 296 F. 2d 74, 76 (10th Cir. 1961). A gross

injustice is manifested where the jury was so obviously misled by the instructions.

In addressing the issue of indivisible injury, Wren in her response tracks the confusion of the Tenth Circuit (Brief in Op., pp. 15-16). Wren fails to recognize that the issue Petitioner has presented here concerns not contribution from a joint tortfeasor, but the Defendant's right to have the Plaintiff's judgment reduced to reflect a prior recovery for the same injury. Wren's misunderstanding is obvious in her attempt to characterize this issue as one interpreting the Wyoming law of contribution. Wren's reliance upon *Robertson v. Wegmann,* 436 U.S. 584, 588 (1978), is thus misplaced. The issue presented by Petitioner has *nothing* to do with the Wyoming law. It does concern whether the nature of the constitutional injury claimed by Wren is indivisible thereby entitling Petitioner to a set-off. Resolution of this question, therefore, *is* a matter of federal law, and has no relevance to the law of contribution that may exist under state law. Furthermore, contrary to Wren's assertion in her response, determining whether the claimed constitutional injury is indivisible is not a factual determination but, instead, is a matter of legal characterization by applying applicable federal standards.

Because this Court has not previously handed down guidelines for lower courts to apply to determine whether a constitutional injury is divisible or indivisible, the Tenth Circuit applied faulty analysis which resulted in an erroneous conclusion based on wholly irrelevant considerations.

C. CONCLUSION

Wren's response highlights the attempt public employees will make in the future to use the precedent established by the court below to unfairly tip the *Pickering* balance in their favor by ignoring the government's interest. Unless this Court acts

immediately to rectify the corrosive effect the decision below will have on future applications of the *Pickering* balance, public employeees will cite with credibility the argument Wren sets forth in her opposition to this petition, to wit: that consideration of the government's interest is precluded under any circumstance where the government chooses to retain the employee. Review by this Court of issues of such substantial importance to public administrators throughout the country is essential.

Respectfully submitted,

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